

Ken Marsh was convicted in November 1983 of murdering Phillip Buell, his girlfriend's two-year old son. Marsh claimed he had never harmed Phillip, and that he found him injured after he had fallen onto the fireplace hearth from the back of a couch. The San Diego Police Department detectives who investigated Phillip's death concluded that Marsh was telling the truth — the child's April 1983 death was accidental from a fall.

However, murder charges were filed against Marsh based on the determination of doctors at Children's Hospital in San Diego that Phillip's head injuries were caused by abuse, and the jury relied on their testimony in convicting Marsh.

On August 10, 2004, Marsh's conviction was vacated and he was released from prison after his petition for habeas corpus was granted without opposition from San Diego District Attorney Bonnie Dumanis. Marsh's petition was based on the analysis of numerous medical experts that Phillip's injuries were consistent with those that would be caused by him hitting his head on a brick fireplace hearth after falling off of a couch. Which was what Marsh had said from the time he was first questioned in 1983, and which the San Diego PD had agreed with after their investigation.

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together in what the government was alleging was a *de facto* conspiracy. Faced with trying the three defendants separately, federal prosecutors dropped the charges against Roberts in June 2005, and against Barcia in July 2005. (See, Marlinga Bribery Prosecution Update, *Justice:Denied*, Issue 28, Spring 2005)

On September 14, 2005, Marlinga was re-indicted on charges of bribery, mail and wire fraud, making false statements to the Federal Election Commission and violating federal campaign finance laws.

Prior to his April 2004 indictment, Marlinga had been the Macomb County Prosecutor for 20 years, and prior to that he had been a federal prosecutor.

Justice:Denied will report as the Marlinga case proceeds.

Endnotes:

1 Marlinga: the rape cases, Staff, *Detroit Free Press*, April 23, 2004.

Sources:

New Indictment Against ex-Macomb Prosecutor Issued, Jim Irwin, *AP News*, September 15, 2005.

Jury Indicts Marlinga Again, David Shepardson, *The Detroit News*, September 15, 2005.

Ken Marsh is "Factually Innocent" Says California's AG

By JD Staff

After Marsh's release he filed a claim for restitution under California's wrongful conviction compensation statute (Cal Penal Code §§ 4900 to 4906). The statute authorizes a payment of \$100 for each day of imprisonment after a wrongful conviction. Based on Marsh's 7,560 days of imprisonment, his claim totaled \$756,000.

After reviewing the claim, the office of California Attorney General Bill Lockyer took the position it should not be granted. Their opposition was based on the fact that the murder charges weren't dropped against Marsh on the basis of his innocence, but because San Diego's DA didn't think she could prove his guilt beyond a reasonable doubt if he was retried. Deputy Attorney General Jim Dutton explained in a memo that while the conclusion of an independent expert retained by the San Diego DA to evaluate the medical evidence, "may be enough to lose confidence in the integrity of Mr. Marsh's conviction ... it does not assist Mr. Marsh in establishing that he did nothing to inflict the injuries."¹

The standard for a successful compensation claim is a claimant must prove his or her innocence by a preponderance of the evidence, and that he or she did nothing to "contribute to the bringing about" of his arrest or conviction.

A hearing to determine if Marsh met the statute's threshold for making a claim, was scheduled to be held in Sacramento beginning on Monday, December 5, 2005.

With the burden of proof on Marsh, Deputy AG Dutton didn't present any evidence at the hearing. Multiple witnesses, including people who didn't testify at Marsh's trial, testified concerning accidents that caused Phillip's injuries that the hospital's doctors incorrectly attributed to abuse by Marsh.

After four days of hearing medical and eyewitness evidence that Phillip's injuries were not caused by Marsh, on Thursday, December 8, Dutton conceded that Marsh was "factually innocent," and thus had met his burden of proof under the statute to qualify for compensation.²

Although the hearing officer makes the final determination of whether to recommend compensation, he is expected to adopt the attorney general's position. The hearing officer's recommendation will be submitted



to the state Victim Compensation and Government Claims Board, which will then consider the merit of Marsh's claim. If they decide in Marsh's favor, then their recommendation goes to the state legislature which must authorize the payment from the state's general fund. If the legislature approves the payment, then it will go to Governor Schwarzenegger for his approval.

The Claims Board has never decided contrary to the recommendation of the attorney general, and the legislature has always appropriated the money approved by the board in a wrongful conviction case. So barring an unprecedented hang-up, Marsh should receive his \$756,000 in compensation sometime in 2006.

Dwight Ritter is the San Diego lawyer who represented Frederick Daye when he was awarded \$389,000 in 2002 after 10 years of wrongful imprisonment for rape. When asked about the adequacy of California's compensation scheme, he said in regards to Daye, "Do I think they fully compensated him? Not at all. One hundred dollars a day does not begin to compensate a person for what 10 years in a place like Folsom Prison does to a person."³

Also pending is a federal civil rights lawsuit that Marsh filed on August 9, 2005, in U.S. District Court in San Diego. The lawsuit named as defendants: San Diego County, San Diego's Children's Hospital, and Dr. David Chadwick (employed by Children's Hospital). As of mid-December 2005, the status of the lawsuit is the defendants have filed FRCvP Rule 12(b)(6) motions to dismiss based on grounds of full and qualified immunity. A Rule 12(b)(6) motion is based on grounds supporting a plaintiff's alleged failure to state a claim.

For more information about Ken Marsh's case see, Toddler's Accidental Death Ends With Babysitter's Murder Conviction — The Ken Marsh Story, *Justice:Denied*, Issue 25, Summer 2004, p. 4.

Sources: State won't block freed man's payout, Greg Moran, *San Diego Union-Tribune*, December 9, 2005. Marsh Press Statement, August 10, 2005, issued by Law Office of Thor O. Emblem, Escondido, CA.

Endnotes and Additional Sources:

1 Wrongful-conviction hearing starts today, Greg Moran, *San Diego Union-Tribune*, December 5, 2005.

2 Email from Tracy Emblem to Hans Sherrer, December 10, 2005. Ms. Emblem is one of Ken Marsh's attorneys.

3 After 20 years in prison, S.D. man seeks to prove he didn't kill child, Greg Moran, *San Diego Union-Tribune*, December 5, 2005.